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7 NOT FOR CITATION  
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9 IN THE UNITED STATES DISTRICT COURT  
10 FOR THE NORTHERN DISTRICT OF CALIFORNIA  
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12 SAN JOSE DIVISION

12 ARCHDIOCESE OF MILWAUKEE  
13 SUPPORTING FUND, INC.,

14 Plaintiffs,

15 v.

16 MERCURY INTERACTIVE CORPORATION, et  
17 al.,

18 Defendants.

Case Number C 05-3395 JF

ORDER (1) DIRECTING THE CLERK  
OF THE COURT TO FILE THE  
COMPLAINT OF MISSISSIPPI PERS  
AND VACATING HEARING DATE  
ON MISSISSIPPI PERS' MOTION TO  
INTERVENE; (2) CONSOLIDATING  
THE INSTANT ACTION WITH THE  
MISSISSIPPI PERS ACTION AND  
THREE OTHER RELATED  
SECURITIES FRAUD ACTIONS; (3)  
GRANTING IN PART MISSISSIPPI  
PERS' MOTION FOR  
ADMINISTRATIVE RELIEF TO  
CONTINUE THE HEARING ON THE  
MERCURY PENSION FUND  
GROUP'S MOTION FOR  
APPOINTMENT AS LEAD  
PLAINTIFF; (4) CONSTRUING  
MISSISSIPPI PERS' MOTION TO  
INTERVENE AS A MOTION FOR  
APPOINTMENT AS LEAD  
PLAINTIFF; AND (5) SETTING  
BRIEFING SCHEDULE RE THE  
LEAD PLAINTIFF MOTIONS

27 The instant action, filed on August 19, 2005, was the first of several securities fraud class  
28 actions filed against Mercury Interactive Corporation ("Mercury") and its officers. Three more

1 securities fraud class actions were filed against Mercury on September 23, 2005 (Case No. C 05-  
2 3864 JF) and October 5, 2005 (Case Nos. C 05-4031 JF and C 05-4036 JF).<sup>1</sup> Additionally, on  
3 November 28, 2005, the Public Employees' Retirement System of Mississippi ("Mississippi  
4 PERS") filed a motion to intervene in the action, seeking leave to file its own securities fraud  
5 class action complaint and to be appointed lead plaintiff.

6 The Court is somewhat puzzled by Mississippi PERS' decision to file a motion to  
7 intervene and, within the context of such a motion, to seek leave to file a securities fraud class  
8 action complaint and to be appointed lead plaintiff. The Private Securities Litigation Reform Act  
9 of 1995 ("Reform Act"), Pub.L. No. 104-67 (1995), does not require leave of court before the  
10 filing of a class action complaint and does not appear to contemplate intervention as an  
11 appropriate means of litigating class claims. Accordingly, the Court simply will direct the Clerk  
12 of the Court to file Mississippi PERS' proposed class action complaint and will vacate the  
13 hearing date on Mississippi PERS' motion to intervene.

14 Having reviewed Mississippi PERS' complaint as well as the complaints in the related  
15 securities fraud actions, the Court concludes that consolidation is appropriate. Accordingly, the  
16 Court will order consolidation of the instant action with the Mississippi PERS action and related  
17 actions C 05-3864 JF, C 05-4031 JF and C 05-4036 JF.

18 With respect to the appointment of lead plaintiff, the Reform Act requires that the Court  
19 appoint the most adequate plaintiff as lead plaintiff "[a]s soon as practicable" after determining  
20 whether related actions should be consolidated. Having determined that all of the securities fraud  
21 class actions filed to date should be consolidated, the Court now turns to the question of  
22 appointment of lead plaintiff.

23 Under the Reform Act, the first plaintiff or group of plaintiffs to file a class action  
24 complaint must, within twenty days after filing the complaint, publish a notice advising members  
25 of the purported plaintiff class of the pendency of the action, the claims asserted therein, the  
26 purported class period and the fact that any member of the purported class may move to serve as  
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28 <sup>1</sup> A number of derivative actions have been filed as well.

1 lead plaintiff within sixty days after publication of the notice. 15 U.S.C. § 78u-4(a)(3)(A)(i).  
2 The notice in the instant case was published on August 21, 2005. Only one application for  
3 appointment of lead plaintiff – that of Mercury Pension Fund Group (“Mercury Group”) filed on  
4 October 20, 2005 – was filed within sixty days after publication of the notice. Mississippi PERS  
5 did not file a timely motion for appointment of lead plaintiff, and in fact it still has not filed such  
6 a motion. However, it is clear from Mississippi PERS’ motion to intervene that Mississippi  
7 PERS in fact seeks appointment as lead plaintiff, and the Court therefore will construe the  
8 motion to intervene as including a motion for appointment as lead plaintiff.

9 Mississippi PERS has filed a motion for administrative relief seeking to continue the  
10 hearing date on the motion of Mercury Group for appointment of lead plaintiff, currently set for  
11 December 9, 2005. The Court will grant that motion in part so that it may address the  
12 appointment of lead plaintiff in an orderly fashion. The Court will set a briefing schedule so that  
13 Mercury Group and Mississippi PERS may address their competing requests to serve as lead  
14 plaintiff for the class. The Court is particularly interested in whether Mississippi PERS’ failure  
15 to file a timely motion precludes it from considering Mississippi PERS as a candidate for lead  
16 plaintiff. Nothing in this order should be read as a determination of the legal question, raised by  
17 Mercury Group in its opposition to Mississippi PERS’ motion for administrative relief, of  
18 whether Mississippi PERS is statutorily barred from seeking appointment as lead plaintiff.

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**ORDER**

- (1) The Clerk of the Court SHALL FILE the proposed securities fraud class action complaint of Mississippi PERS, submitted as Exhibit A to the Schwartz Declaration filed in this action (Doc. No. 22), as a new action under a new case number. The hearing date on Mississippi PERS' motion to intervene is VACATED;
- (2) The instant action is HEREBY CONSOLIDATED with the Mississippi PERS action and with the following related actions: C 05-3864 JF, C 05-4031 JF and C 05-4036 JF;
- (3) Mississippi PERS' motion for administrative relief is GRANTED IN PART. The hearing on Mercury Group's motion for appointment of lead plaintiff is CONTINUED to 9:00 a.m. on Friday, January 13, 2006. At that time, the Court also will take up Mississippi PERS' motion for appointment of lead plaintiff. Any supplemental briefs on these motions shall be filed on or before December 23, 2005. Any supplemental reply briefs shall be filed on or before January 6, 2006.

DATED: 12/8/05

/s/ electronic signature authorized

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JEREMY FOGEL  
United States District Judge

1 Copies of Order served on:

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